LOWELL J. SIMONS

IBLA 87-799 Decided May 9, 1990

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease offers M 53121 (ND) Acq., M 53126 (ND) Acq., and M 54304 (ND) Acq.

Set aside and remanded.

1. Oil and Gas Leases: Lands Subject to--Wildlife Refuges and Projects: Leases and Permits

   Noncompetitive oil and gas lease offers filed prior to Nov. 14, 1983, for any lands which are part of a unit of the National Wildlife Refuge System outside of Alaska may not be adjudicated pending promulgation of regulations explicitly authorizing the leasing of such lands, a hearing on such regulatory revisions, and preparation of an environmental impact statement as required by the terms of P.L. 98-151, § 137, 97 Stat. 964, 981 (1983). Such offers are properly suspended pending compliance with the statutory requirements.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Offers to Lease

   The filing of a noncompetitive oil and gas lease offer at a time when the lands are available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of the Secretary's discretion not to lease a tract of land in the public interest or by operation of law.

APPEARANCES: Lowell J. Simons, Esq., Redding, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Lowell J. Simons has appealed an August 11, 1987, decision of the Montana State Office, Bureau of Land Management (BLM), which rejected his three noncompetitive oil and gas lease offers (M 53121 (ND) Acq.,

M 53126 (ND) Acq., and M 54304 (ND) Acq.) along with 62 others. 1/ BLM stated that it was rejecting the offers "pursuant to 43 CFR 3101.5-1 and based on the Secretary of the Interior's policy that there will be no further leasing in [sic] National Wildlife Refuge System Lands nor promulgation of regulations to authorize the leasing of such lands." (Decision at 1.)

In his statement of reasons (SOR) for appeal appellant asserts that none of the lands listed in his lease offers "lie within any National Wildlife Refuge Lands as shown on Bureau of Land Management plat maps located in the Montana State Office in Billings, Montana." (SOR at 1.) He contends that 43 CFR 3101.5-1 "applies only to Wildlife Refuge Lands," which the regulation defines as "those lands embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area." (SOR at 1.) He concludes that, because the lands in his lease offers are not "within a particular area" included in a wildlife refuge, they are available for leasing. Appellant also seeks to invoke the doctrine of promissory estoppel based on the fact he spent time and money traveling to Montana and North Dakota to search the local records and "filed the subject lease applications and later amended some of them in reliance upon the statutes which seem to say that only lands lying within 'Wildlife Refuge Areas' are not available for leasing" (SOR at 2 (emphasis in original)).

Each of appellant's lease offers indicate they embrace acquired lands under the jurisdiction of the U.S. Fish and Wildlife Service (F&WS). Appellant filed two offers on September 25, 1981. One offer (M 53121 (ND) Acq.) was for 68.65 acres consisting of lot 4, sec. 18, T. 159 N., R. 100 W. and lot 1, sec. 24, T. 159 N., R. 101 W., fifth principal meridian, Williams County, North Dakota. As shown by the plat for T. 159 N., R. 100 W. and a copy of Exec. Order No. 8158, 4 FR 2408 (June 15, 1939), contained in the case file, both parcels are contiguous with lands withdrawn for the Lake Zahl Migratory Waterfowl Refuge established by the order, but are outside the boundary of the withdrawal.

Shading on the township plat for T. 159 N., R. 100 W. shows that lot 4 of sec. 18, along with the SE¼ SW¼ and SW¼ SE¼, is acquired land. It is not clear from the township plat for T. 159 N., R. 101 W. that lot 1 of sec. 24 is subject to Federal oil and gas leasing. The lot is neither shaded nor otherwise noted to show that the surface or minerals have been acquired. Rather, the plat shows that the land was patented. 2/ However, it does appear from the record that, as appellant contends, the lands described in his offer are outside the boundary of the withdrawal.

1/ Beard Oil Company also appealed the decision. It subsequently withdrew its lease offers for the lands at issue. Based on the withdrawal of the offers, the Board dismissed Beard's appeal by an order dated Sept. 2, 1988.

2/ With respect to acquired lands, it is not uncommon that the BLM plats fail to give the complete picture of the current status of title to the land and minerals since the land acquisition title records are generally maintained by the surface management agency for which the land was acquired.

Appellant's second offer filed on September 25, 1981 (M 53126 (ND) Acq.), was for 80 acres described as the E½ NW¼, sec. 27, T. 135 N., R. 100 W., fifth principal meridian, Slope County, North Dakota. Similar to appellant's first offer, the township plat and a copy of Exec. Order No. 8666, 6 FR 771 (Feb. 5, 1941), contained in the case file show that the E½ NW¼ of sec. 27 is contiguous to lands withdrawn for the White Lake National Wildlife Refuge established by the order but is not within the boundary of the withdrawal. Also similar to the first offer, the township plat raises some question as to the actual status of the parcel. Although it appears the land was patented at one time, the tract is noted on the plat as being subject to F&WS jurisdiction with the designation "M O51681 F&WS."

Appellant's third offer (M 54304 (ND) Acq.) was filed on January 29, 1982. The offer was originally for 2,320 acres, but by letter dated September 23, 1982, appellant withdrew the offer as to all but 160 acres consisting of the NW¼, sec. 27, T. 145 N., R. 94 W., fifth principal meridian, Dunn County, North, Dakota. Exec. Order No. 8154, 4 FR 2407 (June 15, 1939), established the Lake Ilo Migratory Waterfowl Refuge as to "all lands owned or controlled by the United States" within specified areas, including the S½ NW¼ of sec. 27, T. 145 N., R. 94 W. 3/ The township plat in the case file shows that, while all of the NW¼ is acquired land, the N½ NW¼ is not included in the withdrawal for the Lake Ilo Refuge. The S½ NW¼ of sec. 27, on the other hand, is part of the refuge withdrawal.

Thus, review of the record discloses that with the exception of the last-identified tract, all of the remaining lands described in appellant's acquired lands oil and gas lease offers are outside the boundaries of the lands withdrawn for wildlife refuge purposes. The issue raised by this appeal is whether these lands may be considered available for oil and gas leasing.

The regulation cited in the BLM decision provides in part that:
"No offers for oil and gas leases covering wildlife refuge lands shall be accepted and no leases covering such lands shall be issued excepted as provided in § 3100.2 [regarding lands subject to oil and gas drainage] * * *." 43 CFR 3101.5-1(b). The regulatory definition of "wildlife refuge lands" includes "lands embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area." 43 CFR 3101.5-1(a). In light of this definition, the Board held in Esdras K. Hartley, 57 IBLA 319, 323 (1981), that the prohibition on leasing applies only to those lands embraced

fn. 2 (continued)
Hence, resort to the title records of the F&WS is necessary to confirm title. Although it appears that title reports for the subject lands were requested from F&WS, no reports were provided apparently because of the conclusion that wildlife refuge lands would not be leased.
3/ On July 25, 1940, the name of the refuge was changed to the Lake Ilo National Wildlife Refuge. Presidential Proclamation No. 2416, 3 CFR 167, 172 (1938-1943 Comp.).

in a withdrawal for the protection of all species of wildlife. 4/ This appears to be the essence of appellant's objection to the BLM decision rejecting his offers as to lands outside the boundaries of the withdrawals.

[1] The Board's decision in Hartley was perceived by some, both within and outside the Department of the Interior, as altering the availability for leasing of wildlife refuge lands outside Alaska under the exist-ing regulations. See Comptroller General, Economic Uses of the National Wildlife Refuge System Unlikely To Increase Significantly 83-86 (June 15, 1984). The prospect of leasing acquired nonwithdrawn lands within wildlife refuges outside Alaska precipitated a lawsuit challenging the failure to give notice and opportunity for comment as required by rulemaking provis-ions of the Administrative Procedure Act, 5 U.S.C. §§ 551, 553 (1982). Id. at 81. Subsequent to the Board's decision in Hartley, legislation was enacted in 1983 barring issuance of noncompetitive oil and gas leases for lands in units of the National Wildlife Refuge System 5/ in the absence of certain prerequisites:

> No funds in this or any other Act shall be used to process or grant oil and gas lease applications on any Federal lands outside of Alaska that are in units of the National Wildlife Refuge System, except where there are valid existing rights or except where it is determined that any of the lands are subject to drainage as defined in 43 CFR 3100.2, unless and until the Secretary of the Interior first promulgates, pursuant to section 553 of the Administrative Procedure Act, revisions to his existing

4/ In Hartley we cited and followed the holding in Stephen C. Helbing, 76 I.D. 25, 29 (1969), that the definition of wildlife refuge lands cannot be "read to include lands outside the withdrawn area even if they were acquired for the same purposes as the lands in the withdrawn areas." In deciding Hartley, we expressly overruled two contrary precedents. The overruled cases applied the regulatory ban on leasing of wildlife refuge lands to uphold rejection of oil and gas lease offers for lands acquired for the purpose of inclusion in a wildlife refuge even though not within the boundary of the withdrawal. Esdras K. Hartley, supra at 323 n.5, overruling Lee B. Williamson, 54 IBLA 326 (1981), and David A. Provinse, 49 IBLA 134 (1980).

5/ In 1964 Congress designated the National Wildlife Refuge System to include "those lands and waters administered by the Secretary as wildlife refuges, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order." P.L. 88-523, § 1, 78 Stat. 701 (1964), codified as amended at 16 U.S.C. § 715s (1982). With enactment of the National Wildlife Refuge System Administration Act of 1966, Congress added a sixth category consisting of "areas for the protection and conservation of fish and wildlife that are threatened with extinction." P.L. 89-669, § 4(a), 80 Stat. 926, 927, codified as amended at 16 U.S.C. § 668dd(a) (1982). With enactment of the Endangered Species Act of 1973, the list of areas in the former statute was modified to explicitly refer to species listed as endangered or threatened. P.L. 93-205, § 13(b), 87 Stat. 884, 902.

> regulations so as to explicitly authorize the leasing of such
> lands, holds a public hearing with respect to such revisions, and prepares an environmental impact statement with respect thereto.

H.R.J. Res. 413, P.L. 98-151, § 137, 97 Stat. 964, 981 (1983).

The policy referred to in BLM's decision is reflected in the terms of Instruction Memorandum No. 84-171, Change 1 (Mar. 22, 1984). That document, prompted by the above-quoted legislation, states in part:

> In recent Congressional testimony and in letters to the Chairmen of the Senate and the House Interior Appropriations
> Subcommittees, Secretary Clark stated that the Department has no plans to allow oil and gas activity in wildlife refuges outside Alaska except in cases of drainage and valid existing rights.
>
> Based on Mr. Clark's policy declaration, there will be no further leasing in wildlife refuges outside Alaska in the foreseeable future, nor promulgation of regulations to authorize the leasing of such lands, and no further preparation of an environmental impact statement * * *.

As understood at the time, "[u]nder the provisions of the continuing resolution, the Department cannot expend any funds to process any of the pending applications, so their suspension would continue indefinitely." Comptroller General, Economic Uses Of The National Wildlife Refuge System Unlikely To Increase Significantly 38 (June 15, 1984). Subsequently, the BLM Manual was revised to state:

> Pending offers or applications for lands not withdrawn for
> the protection of all species of wildlife, and pending as of November 14, 1983, will remain suspended in accordance with
> the law of that date prohibiting leases of such lands. All noncompetitive oil and gas lease offers received on or after November 14, 1983, shall be returned by letter as unacceptable.

BLM Manual, § 3101.51(B) (Rel. 3-86, Oct. 3, 1984).

It seems clear that the intent of Congress in enacting this statu-tory provision was that the pre-requisites to leasing wildlife refuge lands apply to tracts acquired as part of the system regardless of whether they are within the boundaries of a withdrawal. 6/ This view is shared by the

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6/ The requirement to revise the relevant regulations to "explicitly authorize the leasing of such lands" as a prerequisite to the issuance of leases would be of much more limited application if it did not apply to wildlife refuge lands outside the withdrawal boundaries as withdrawn lands were already unavailable to the extent the withdrawal embraced all species of wildlife.

Comptroller General 7/ as well as by the authors of the BLM Manual provision quoted above. In light of these statutory restrictions on leasing wildlife refuge lands, the Board has held that the adjudication of oil and gas lease offers filed prior to November 14, 1983, is properly suspended pending any further rulemaking and preparation of an environmental impact statement. Accordingly, the Board has set aside and remanded BLM decisions rejecting such offers. See TXO Production Corp., 87 IBLA 85 (1985); Rachalk Production, Inc., 84 IBLA 47 (1984); D. M. Yates, 82 IBLA 389 (1984); Hingeline Overthrust Oil & Gas, Inc., 80 IBLA 4 (1984). In TXO Production Corp., supra, we also noted that appellant may wish to consider the desirability of relinquishing his offers in view of BLM's announced intention not to consider leasing refuge lands outside Alaska in the foreseeable future. 87 IBLA at 87 n.2.

[2] Further, we find that appellant lacked any valid existing right to a lease which would exempt his offers from the statutory provision. The fact that an appellant's oil and gas lease offers were pending at a time when the land was available for leasing does not establish any legal or equitable right to a lease where the land subsequently becomes unavailable for leasing either by reason of the exercise of Secretarial discretion or by operation of law. Justheim Petroleum Co., 67 IBLA 38, 41 (1982).

Appellant asserts that he relied upon the BLM records and, based on promissory estoppel, should be awarded the leases. The argument is without merit. Reliance on the records cannot create a right to lease if such right is not authorized by law. 43 CFR 1810.3(c) (1988).

The Board has well-established rules governing consideration of estoppel issues. See Enfield Resources, 101 IBLA 120, 124 (1988), and cases cited therein. They include the standards set forth in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). In addition, estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as the misrepresentation or concealment of material facts. Enfield Resources, supra at 124 (citing United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978)).

Appellant asserts in his SOR that he acted "in reliance upon the statutes which seem to say that only lands lying within `Wildlife Refuge Areas' are not available for leasing" (SOR at 2) (emphasis supplied). Appellant's reliance upon his interpretation of the terms of the relevant statute or regulation will not suffice to establish grounds for estoppel. As a threshold matter, there has been no showing of affirmative misconduct such as a misrepresentation or concealment of a matter of material fact. Further, as noted above, there is no valid existing right to a lease. It has long been recognized that under 30 U.S.C. § 226 (1982) the decision

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7/ In commenting on the legislation it was stated that "Recent congressional action has obviated the need to determine as a legal matter whether BLM has altered its policy concerning oil and gas leasing on all wildlife refuge lands." Comptroller General, Economic Uses Of The National Wildlife Refuge System Unlikely To Increase Significantly 86 (June 15, 1984). Regarding the specific question of whether prior lease applications for acquired nonwithdrawn refuge lands may be approved subsequent to passage of P.L. 98-151, § 137, the report concluded in the affirmative if the lands are made available for leasing by amendment of the regulations. Id. at 98-99.

whether or not to issue an oil and gas lease is a matter within the discretion of the Secretary. Burglin v. Morton, 527 F.2d 486, 488 (9th Cir.), cert. denied, 425 U.S. 973 (1976); Haley v. Seaton, 281 F.2d 620, 624-625 (D.C. Cir. 1960). Even if it is conceded that the lands at issue were subject to oil and gas leasing under the relevant regulation prior to enactment of the statute precluding leasing (except in certain circumstances which do not apply here), the Secretary has the discretionary authority to refuse to issue any lease at all for a given tract of land in the public interest. Udall v. Tallman, 380 U.S. 1, 4 (1965); Burglin v. Morton, supra at 488. Accordingly, appellant's claim of estoppel must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1988), the decision appealed from is set aside and the case is remanded as to appellant's lease offers.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Charles B. Cates
Director, Ex Officio Member